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DEPT. OF TRANSPORTATION
DOCKETS

BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

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Application of

ORBITZ, L.L.C.

for, to the extent necessary, an exemption
pursuant to 49 U.S.C. § 40109

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) Docket OST-2001-11086 - 5
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OPPOSITION TO PETITION FOR RECONSIDERATION

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Dated: January 7, 2002

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Last month, Orbitz, L.L.C. (“Orbitz”) began to phase in a nominal fee for its travel agent services in conjunction with the tickets for air transportation that it sells. Airfares and the service fee are unbundled in certain Orbitz displays – *i.e.*, the fee is not included as a part of the airfare, but instead is separately but concurrently stated. Orbitz believes that fully disclosing both the airfare and the service fee, unbundled, is the best form of disclosure for consumers. Separate disclosure allows consumers to compare airfares against airfares and to comparison shop one airlines’ schedule, fares and services against another. The consumer can choose to purchase the tickets from Orbitz, and to pay a nominal fee, or from a traditional travel agent where he or she is likely to pay a higher fee, or to continue to search for another channel that may charge less. The consumer can compare the services provided by Orbitz, including its ease of use and advanced customer care, against its competitors, online and offline, to determine the best place to purchase the ticket. Where fares and fees are bundled, these pro-consumer comparisons cannot be made.

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On December 7, 2001, the Department issued Order 2001-12-7, stating that Orbitz may unbundle airfares and service fees, subject to certain terms and conditions. The Department also stated that the Enforcement Office would apply the same terms and conditions to other online travel agents. See id. at 5 n.6. See also Revised Enforcement Policy on Deceptive Practices Regarding Service Fees Charged by Travel Agents in the Marketing and Sale of Airfares to the Public via the Internet, Notice (Dec. 19, 2001). The Department recognized that this exemption would benefit consumers, explaining that “consumers may benefit from knowing the service fees that travel agents are charging for air transportation.” Order 2001-12-7, at 4. In particular:

Currently, many travel agents are quoting fares to consumers that include a service fee. We are concerned that some consumers who receive quotes from these sellers will not realize that other sellers may offer the same flights at a lower price because they are charging lower service fees or no fees at all.

Id. The Department’s recognition that online travel agents should be able to make service fees visible to the consumer is an important one, because that visibility not only will improve the information provided to consumers, but also encourages competition among online travel agents with respect to service fees.

Travelocity.com, L.P. (“Travelocity”) has filed a petition for the reconsideration of Order 2001-12-7, primarily arguing that the exemption also should allow the unbundling of air carrier fuel surcharges. Orbitz, in contrast, believes that the unbundling of fuel or other surcharges imposed by air carriers would harm, not benefit, consumers. Travelocity also argues that the Department should add additional terms and conditions to the exemption, and questions Orbitz’s compliance with the terms and conditions of Order 2001-12-7. For the reasons discussed below, Travelocity’s petition for reconsideration should be dismissed.

(1) Fuel Surcharges Should Not Be Permitted to Be Unbundled

Travelocity asserts that because the Department has issued an exemption to Orbitz (and to all other online travel agents) that sets forth terms and conditions for the unbundling of travel agent service fees in displays, the Department also should authorize online travel agents to unbundle air carrier fuel surcharges. Indeed, Travelocity goes farther than that, arguing that by allowing online travel agents to disclose both airfares and service fees distinct from each other, the Department has (1) afforded the same treatment to air carrier-imposed fuel surcharges and (2) reversed its long-standing policy on full fare disclosure.¹ Orbitz believes that Travelocity is wrong on both points.

The Department has, through a long series of consent orders,² made it abundantly clear that air carrier-imposed fuel surcharges must be included in the airfare, and rightly so. A fuel surcharge is an inherent and unavoidable part of the cost of air transportation. The consumer does not have the option of purchasing that same seat from a different retailer without a fuel

¹ In particular, Travelocity argues that:

“[T]he Department has changed course in its interpretation of... the “Fare Advertising Regulations”... by not requiring Orbitz to include its new service fee as part of the airfares in the fare displays on the Orbitz website. Travelocity, along with many other carriers and agents providing travel online, has long asserted that the omission of any service fees or fuel surcharges from the initial presentation of a base fare should not violate the Fare Advertising Regulations.... With the Orbitz Order, it appears the Department now shares this view and will apply this precedent in any pending or future enforcement matters.

Travelocity Petition for Reconsideration, at 3.

² See, e.g., Expedia, Consent Order, 2001-12-1 (Dec. 3, 2001); Lowestfare.com, Consent Order, 2001-9-3 (Sept. 6, 2001); Northwest Airlines, Consent Order, 2001-8-1 (Aug. 2, 2001); Grand Bahamas Vacations, Consent Order, 2001-6-2 (June 5, 2001); US Airways, Consent Order, 2001-5-32 (May 30, 2001); Vacation Express Holdings, Consent Order, 2001-5-31 (May 30, 2001); Vanguard Airlines, Consent Order, 2001-4-19 (Apr. 13, 2001); Tower Air, Consent Order, 97-11-14 (Nov. 7, 1997); US Airways, Consent Order, 97-8-25, (Aug. 27, 1997); Delta Air Lines, Consent Order, 97-7-24 (July 24, 1997); American Express Travel Related Services Company, Consent Order, 96-11-19 (Nov. 19, 1996); Continental Airlines, Consent Order, 95-1-39 (Jan. 26, 1995); Delta Air Lines, Consent Order, 93-4-40 (Apr. 20, 1993); USAir, Consent Order, 92-5-23 (May 13, 1992); Pan American World Airways, Consent Order, 89-4-25 (Apr. 11, 1989).

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surcharge, or with a different fuel surcharge. Further, the fuel surcharge is imposed by the air carrier, accrues to the air carrier, and is used to defray the direct costs of providing the air transportation. Travelocity, in footnote 4 of its petition for reconsideration, and the Department are absolutely correct that the fuel surcharge and any other surcharge imposed by the air carrier is a part of the airfare and must be disclosed as part of the airfare.

A travel agent service fee, in contrast, is imposed by a travel agent, accrues to the travel agent, and is for the expertise and services provided by the travel agent. Further, the fee, and the quality of service received, varies from travel agent to travel agent, so that a consumer can pay a different service fee, or no service fee at all, for purchase of the same seat, depending on from which retailer he or she buys a ticket. In short, an agent service fee, as compared to an air carrier fuel surcharge, is a different payment, to a different party, for a different service, in a different market.

The consumer is best served by a different method of disclosure for agent service fees than for air carrier fuel surcharges, and that is exactly what the Department has provided for in Order 2001-12-7. There is no implication whatsoever in that Order that the Department is now allowing anything other than the separate disclosure of agent service fees. The Order clearly states that “[w]e have ... decided to allow Orbitz to list its service fees separately from the fares on its fare/itinerary displays....” *Id.* at 4. There is no indication whatsoever that any exemption is being granted to Orbitz, or to other online travel agents, with respect to anything other than agent service fees. Neither Travelocity nor any other party could be genuinely confused on this point. The Department has not changed its position in the slightest with respect to air carrier fuel surcharges.

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Furthermore, Orbitz believes that the Department has not changed its position on agent service fees. While the Department has been clear that “any fuel surcharges, as well as *ad valorem* taxes or any additional carrier or vendor fees, must be included in the advertised fare,” – see, e.g., Expedia, Consent Order, 2001-12-1 (Dec. 3, 2001) – that policy has been set forth in the context of the Department’s regulatory requirement that the advertised price must be “the entire price to be paid by the customer to the... agent, for such air transportation....” 14 C.F.R. § 399.84 (emphasis added). In contrast, a fee paid to a travel agent for a travel agent’s expertise and services is not a fee paid for air transportation, any more than it would be if the same amount had been paid to a travel agent for flight insurance, or for parking at the airport, or for a good book to read while on the flight.

The most important issue in this proceeding is that of consumer benefit. The Department has concluded that there is a real consumer benefit in allowing online travel agents to separately disclose to consumers both the airfare and the agent service fee. Not even Travelocity has been able to argue that not including air carrier fuel surcharges in the airfare somehow would benefit the consumer. Doing so might have benefits for Travelocity, but not for the consumer.

Orbitz did not request an exemption allowing the unbundling of air carrier fuel surcharges, nor does Orbitz desire one. If Travelocity is interested in obtaining such an exemption, whether for itself alone or on behalf of all online travel agents, and if it believes that it can explain why such an exemption would be warranted, Travelocity certainly is entitled to file such an application with the Department. But Travelocity should not be allowed to piggyback its anti-consumer and anti-competitive agenda onto this docket. Orbitz fully supports the long-standing position that air carrier-imposed surcharges must be included in the base fare advertised to consumers. See, e.g.,

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Order 89-4-25, at 1 (“per-passenger surcharges that carriers themselves set ... are not exempt from section 399.84”) (emphasis added). Online travel agents, including Orbitz, should continue to be required to include carrier-imposed amounts, such as fuel surcharges, in the airfares displayed throughout the online booking process, and the Department has quite correctly never suggested otherwise.

(2) Additional Terms and Conditions Are Unwarranted

Travelocity, as a direct competitor to Orbitz, also argues that additional terms and conditions should be added to the exemption. This is a transparent effort by Travelocity to redesign the website of a competitor in ways which would be less attractive or useful to the customers of that competitor, or would otherwise artificially disadvantage that competitor. The Department should not be drawn into this unsavory agenda.

First, Travelocity argues that Orbitz should be required to disclose on the first page of its website that “each and every airfare offered by Orbitz, including web-only specials, is available for less on airline websites.”³ The Department already has reviewed and rejected this general proposal in Order 2000-10-23. The Department specifically noted that travel agents had no duty to inform consumers that lower fares might be available through alternative channels, in part

³ Presumably, this same or a similar disclosure would be required of all online travel agents. Travelocity would, at a bare minimum, be required to disclose that each and every Northwest and KLM fare it offers is available for less on airline websites, because Travelocity has since March 2001 charged a \$10 fee for those carriers’ tickets. Moreover, Travelocity does not include web fares from many air carriers because Travelocity will not offer those carriers the same return benefits that Orbitz will, including bias-free displays, lower distribution costs through CRS booking fee offsets, and ownership of their own marketing and booking data. Travelocity does not specify whether it should also be required to prominently disclose this fact to consumers.

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because travel agents are not charged with the responsibility of knowing precisely what fares (that they are not authorized to sell) that air carriers may be offering through other channels.

The Department's position applies with equal force to all travel agents, both online and traditional. No online travel agent has access to all of the fares offered by all air carriers,⁴ nor reasonably can be charged with knowledge of the pricing practices of all air carrier websites. Travelocity's proposal that Orbitz and all other online travel agents be required to post such a disclaimer on their websites essentially amounts to a demand that online travel agents engage in a practice that in fact may be unfair and deceptive. Clearly, such an anti-consumer practice should not be required by the Department.

Orbitz notes that the ongoing proceeding to revise 14 C.F.R. Part 255, Docket OST-97-2881, includes numerous comments on the availability of airfares on the Internet and the specific rules, if any, that should govern the sale of air transportation online. Travelocity's proposal, to the extent that it has any merit, bears little relationship to the exemption at issue in this docket. If the Department deems it necessary to evaluate Travelocity's disclosure proposal in detail, the proposal should be dealt with in Docket OST-97-2881 and not in this proceeding.

Second, Travelocity argues that Orbitz specifically should be required to eliminate a reference on its website to two pricing studies that found that Orbitz meets or beats the fares of its largest competitors in more than 8 out of 10 searches, with an average savings of more than

⁴ As the Department is aware, Orbitz's charter associate agreement includes a "most-favored nation" (MFN) clause. However, the scope of the MFN clause is quite limited; it does not include "unpublished" fares, including corporate, government, membership club, affinity program, or opaque fares, nor fares advertised via targeted e-mail or bundled with vacation packages or non-travel products. In addition, as Orbitz reported to the Department in November 2001, Orbitz has never invoked the MFN clause in any of its charter associate agreements. Moreover, Orbitz is committed to displaying and selling all of the airfares that carriers make available to Orbitz, without bias, regardless of whether those carriers are Orbitz charter associates.

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\$75 per ticket. Orbitz understands why Travelocity would wish to suppress these studies to the extent possible, because they demonstrate Orbitz's superior ability to find low fares. Travelocity alleges that the references to these studies are misleading, because they were conducted before Orbitz began to phase in a service fee. Because Travelocity does not challenge the validity of these studies, it appears that its complaint is premised on the assumption that the service fee should be considered to be a component of the airfares available on Orbitz.

There is a critical distinction between an "airfare" and the total price paid to a travel agent for air transportation, lodging, car rentals, agent service fees, and so on. The Department long has required that travel agents make consumers aware of the total price of air transportation. See, e.g., 14 C.F.R. § 399.80(f). At the same time, however, the Government has not defined a service fee charged by a travel agent to be a part of the airfare at issue, but as a separate charge for a separate service. See, e.g., CAB Order 70-5-35, at 10-11 (May 8, 1970). Orbitz's phasing in of a service fee therefore has not altered the airfares available on Orbitz, or the validity of the studies cited.

Furthermore, there can be no issue here as to whether the mention of these studies causes consumers not to be informed that a service fee is now being charged by Orbitz. The mention of the studies of which Travelocity complains comes, in fact, in the middle of a letter to customers fully explaining the new service fee. The issue here is not consumer deception or the accuracy of the reports, but Travelocity's dissatisfaction with the truth of the reports. Orbitz does do a better job of finding lower airfares, through both a better business plan that gives carriers a cost-saving incentive to sell web fares via Orbitz, and by using a superior search technology to find fares in the data that is available to all agents. Travelocity has the option of taking one or both of those

steps, but has not done so, and therefore does less well on average in finding low fares for its customers. It now wishes this fact to be kept from the public.

(3) Orbitz's Is in Compliance with Order 2001-12-7 as Promulgated

Lastly, Travelocity asserts that Orbitz has not complied with some of the terms and conditions of Order 2001-12-7. These allegations are not a proper subject of a petition for reconsideration. A petition for reconsideration is specifically intended to be a vehicle for a party to argue that a specific matter of record has been erroneously decided. See 14 C.F.R. § 302.14. Because Travelocity does not in this context challenge any specific errors in Order 2001-12-7, any assertions as to Orbitz's compliance with the order should be dismissed. Any concerns that the Department may have as to Orbitz's compliance with the terms of Order 2001-12-7 should be handled through the Department's usual procedures of consultations with regulated parties.

Nevertheless, we have no reason not to respond to the issues raised by Travelocity.

First, Travelocity alleges that pop-up screens of Orbitz fare information, provided by Comet Systems ("Comet"), do not comply with Order 2001-12-7 because they do not contain disclaimers about service fees. Comet is a company that offers to consumers who choose to use the service the ability to display comparative fare advertising in a pop-up screen when the user of Comet's services visits other online travel agents.⁵ Travelocity alleges that these pop-up screens

⁵ Travelocity claims that Comet "intercept[s] the transmissions from consumers" and also adds an implied threat through its statement that Travelocity would not comment "on whether such action raises other legal issues." See Travelocity Petition for Reconsideration, at 6. Travelocity – much like its parent company, Sabre – seems to believe that consumers do not have a right to determine who should respond to their own requests for information about air transportation. Orbitz believes that consumers have an inalienable right, if they so choose, to contract with a third party (i.e., Comet), to display comparative airfare data in response to that consumer's own information request. Comet's pop-up screens appear only if a consumer voluntarily has chosen to use Comet's services. Moreover,

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are the equivalent of the “first page” of the Orbitz website, as defined in Order 2001-12-7, and that they therefore are required by the Order to include the same disclosures as must be made on the first page of the Orbitz website. Travelocity cites no authority for this proposition. The reference to the “first page” of the Orbitz website in Order 2001-12-7 clearly was not intended to set forth regulatory standards for advertising on other websites or in other media, such as third-party pop-up screens. The Order addresses strictly the question of what Orbitz (and other online agents) can do on their own websites with respect to the disclosure of agent service fees.

If Travelocity has views about what regulations should apply to entities which publish information about air transportation, but which do not sell air transportation and are not travel agents (*i.e.*, Comet, SideStep, or any article about travel in any print publication), or views about by what authority the Department would regulate such entities, it should make those suggestions in the forthcoming rulemaking the Department has announced.

Although it is erroneous to argue that Order 2001-12-7 somehow requires Comet to include certain disclosures in its displays, it has been Orbitz’s view that its customers would want these disclosures, not only on the Orbitz site, but also on Comet’s pop-up screens. Orbitz understands the facts to be as follows. The original launch of Comet’s fare comparisons occurred immediately before the Department issued the Order. Following the issuance of that Order, software changes to add a fee disclosure to the Comet screens were put in the queue and since have been loaded for all new users opting for the Comet service. In addition, Comet is in the process of updating the software of users who opted to install it prior to that modification.

contrary to Travelocity’s claims, Comet (as well as Orbitz) do not in any way “intercept” transmissions from Travelocity to a consumer.

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Finally, Travelocity alleges that Order 2001-12-7 requires that “Orbitz must prominently disclose that it charges a service fee on the first page of its website,” but that Orbitz does not do so on its home page. As the Department is well aware, Orbitz has placed a notice of the service fee on its home page and has done so since the phase-in of the service fee first began. The Department in Order 2001-12-7 required Orbitz to “prominently disclose that it charges a service fee on the first page of its website and at a minimum provide a link to its pop-up explanation.” In the same order, the Department then notes that that “Orbitz’s displays were in compliance with [this condition] when it initiated its service fee practice in early December.” Order 2001-12-7, at 5, n.5. Orbitz continues the same method of disclosure on its home page today. Thus, the Department already has found and stated in the Order that Orbitz’s method of home page disclosure is an acceptable method of complying with the conditions on home page disclosure.

Conclusion

The exemption that the Department has issued to Orbitz (and which it has extended to all other online travel agents) is tailored to encourage competition among the agents for consumers’ patronage, without diminishing the Department’s long-standing commitment to ensuring that consumers are provided with full and accurate information about the price of air transportation. Orbitz has not sought and does not desire any change in the Department’s long-standing policy that air carrier-imposed surcharges must be included in the base airfare advertised by travel agents; in contrast to travel agent service fees, there is no competitive justification for unbundling these surcharges. The other allegations raised by Travelocity in this proceeding are

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without merit and/or are inappropriate for a petition for reconsideration. Travelocity's petition for reconsideration should be dismissed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Frank J. Costello', is written over a horizontal line.

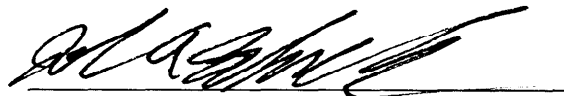
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January 7, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January 2002, a copy of the foregoing Opposition was served by first class mail, postage prepaid, on the following.



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